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NATIONAL EXPANSION UNDER THE CONSTITUTION

OR

Despotic Power *versus* Delegated Authority

BY

EDWIN BURRITT SMITH

OF THE CHICAGO BAR

(ADDRESS IN REPLY TO CONGRESSMAN MANN, SUNSET CLUB, CHICAGO, OCT. 27, 1898, REVISED)

"In vain we call old notions fudge,
And bend our conscience to our dealing;
The ten commandments will not budge,
And stealing will continue stealing."

—LOWELL

The Union, under the leadership of Abraham Lincoln, ceased to be divided. Shall we voluntarily again divide it? Shall we permit despotic power to be set up at Washington, there to compete with delegated authority for final supremacy?

CHICAGO
R. R. DONNELLEY & SONS COMPANY
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"We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America." — PREAMBLE.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." — FOURTEENTH AMENDMENT.

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*"It was in the oath I took that I would, to the best of my ability, preserve, protect, and defend the Constitution of the United States. * * * Nor was it my view that I might take an oath to get power, and break the oath in using that power. * * * I did understand * * * that my oath imposed upon me the duty of preserving, to the best of my ability, by every indispensable means, that government, that nation, of which the Constitution was the organic law."* — LINCOLN.

"The late M. Guizot once asked me how long I thought our republic would endure? I replied: 'So long as the ideas of the men who founded it continue dominant,' and he assented." — LOWELL.

National expansion involves "a greater danger than we have encountered since the Pilgrims landed at Plymouth — the danger that we are to be transformed from a republic, founded on the Declaration of Independence, guided by the counsels of Washington, into a vulgar, common place empire, founded upon physical force." — SENATOR HOAR.

P.
A. B. Slauson

NATIONAL EXPANSION UNDER THE CONSTITUTION

The new policy of national expansion, into which we are drifting, calls for a re-examination of the essential conditions of free government. What will our new possessions do with us, not what shall we do with them? is, as Bishop Potter suggests, the real question. Our institutions rest upon the proposition that governments derive their just powers from the consent of the governed. This consent means more than mere acquiescence. It contemplates the active parpticipation by the governed in a government which is their own and which they alone control. Our governments, local, state and national, exercise only such authority as is conferred upon them by the people. None of them claims or exercises original or arbitrary power. All, as the agents of the governed, execute none but delegated authority.

The President and the Congress of the United States must govern all new acquisitions of territory under and by virtue of the Constitution, or by self-assumed and arbitrary power. The Constitution created a nation of States, "an indissoluble Union of indestructible States." It called into being a United States of America, not a United States of America and Asia. Every person born or naturalized within its borders was to be a citizen of the nation and of the State of his residence. All the people of the nation

were to constitute a brotherhood of citizens having equal rights before the law, which might not be denied or abridged because of race or color. There were to be no subjects, but only citizens. Congress might organize territorial governments for the administration of the sparsely settled national domain outside the States; but the territorial form of government was to be but temporary and merely preparatory to statehood. Such was our noble scheme of popular government; such was our splendid vision; and until now there has been no desire among us to have it otherwise.

The power to acquire new territory has long since ceased to be a subject of controversy; but all our acquisitions heretofore made in its exercise have been of contiguous and unoccupied or but sparsely settled territory. Our people have rushed into these empty spaces and planted there our institutions without let or hindrance. The widely assumed analogy between such acquisitions and those now proposed of distant islands, already occupied by half-civilized races of different languages and institutions and having a climate in which white men cannot or will not live, is purely fantastic. The precedent of our earlier acquisitions has already been greatly overworked as a justification for a policy which is in fact entirely novel. If this is not so, and the proposed acquisition of the Philippines is but an incident of an accepted national policy, it follows that these islands are to be acquired and promptly admitted to statehood, as all our prior acquisitions of sufficient population have been; or at least that they shall be given temporary territorial governments preparatory to their early admission as States.

The power to acquire territory being admitted, whether it shall now be exercised—especially in the

case of the Philippines—is for Americans the gravest question of our time. Can these islands be acquired without their becoming the property, the territory, of the United States? If such territory, they will at once be subject to the Constitution and general laws of the United States. The moment new territory is incorporated into the national domain its inhabitants become citizens of the Unted States, and as such "entitled to all privileges and immunities of citizens in the several States." The Supreme Court has held that "the provisions of the Constitution relating to trials by jury for crimes and to criminal prosecutions apply to the territories of the United States";* that Congress in legislating for the Territories and District of Columbia is subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments;† and that all citizens of the United States have "the right to come to the seat of government," to have "free access to its seaports," and to pass freely from one part of the country to every other part.‡ The Supreme Court has also, as late as March last, held that under the fourteenth amendment, which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," American born Chinamen of alien parentage are citizens and free from the provisions of the exclusion *treaties* and acts; also that Congress has no authority "to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."‖

* Thompson *vs.* Utah, 170 U. S. 343, 346.

† The American Publishing Society *vs.* Fisher, 166 U. S. 464, 466.

‡ Crandall *vs.* Nevada, 6 Wall., 35.

‖ United States *vs.* Wong Kim Ark, 169 U. S., 649, 705.

The inhabitants of annexed territory become citizens of the United States and of the several States without naturalization. This rule of international law has always been accepted by us without question until this year. The attempt by Congress to prevent its application to Hawaii will fail. To sustain it, the Supreme Court must hold that Congress may acquire territory conditioned that it shall not be subject to the Constitution; that it may determine whether acquired territory shall be its private possession or the property of the United States; in a word, that it may in its discretion assume and exercise arbitrary power.

The constitutional power of Congress to "make all needful rules and regulations respecting the territory or other property of the United States" thus appears to have important limitations. The few national expansionists who seem to have considered how we shall govern remote islands inhabited by mixed and half-civilized races, have too lightly assumed that the power of Congress to make such rules and regulations is sufficient warrant for any kind of administration whatever. The truth is that the bill of rights must be applied to all the territory of the United States. The mere acquisition of territory renders it subject to the Constitution and general laws of the United States. To realize something of what this means, imagine the administration of the criminal code among the half-civilized and savage races of the Philippines by the complex methods prescribed by the fifth and sixth amendments.

The attempt to impose free institutions from without upon half-civilized and even savage races in a remote part of the world is, however, by no means the worst feature of the Quixotic adventure upon which we are asked to enter. The Constitution of the United

States also povides that "*all duties, imports and excises shall be uniform throughout the United States.*" If these islands, under whatever form of administration, come under the civil authority of the United States, thereupon our tariff and revenue laws, *ipso facto*, apply to them. It is beyond the power of Congress to exempt any territory of the United States from the operation of this plain constitutional provision. It follows that unless we greatly modify our tariff, our mere assumption of civil jurisdiction over these islands will impose upon them the antiquated colonial system of taxation from which we revolted in 1776, and to rescue them from which we have just broken the peace of the world. Thus grossly to discriminate in favor of our own manufacturers will not only impose intolerable burdens upon the islanders, but certainly lead us directly into trouble with other commercial nations, whose merchants should have the right to trade with these people upon the same terms as our own.

This, however, is not all that this dangerous policy involves. We have seen that the inhabitants of our proposed acquisitions will at once become citizens of the United States, and have all the immunities of citizenship in every part of our country. It is reported that from one-fourth to one-third of the present inhabitants of Luzon are Chinamen. The other elements of its population are even less desirable as citizens. We have now for some years, for reasons some of which are generally regarded sufficient, prohibited further Chinese immigration. If the Chinamen of the Philippines and their other inhabitants become citizens by reason of their acquisition by us, we can no longer legally prohibit them from coming here. If this were all, we might at least limit the possible invasion to those who are the present inhabitants of the islands

and to their descendants. It is, however, one thing to protect our present territory from the immigration of the yellow peoples of the East. It would be quite another for us arbitrarily to take possession of a great archipelago in that region and exclude from it the peoples of its own neighborhood. Indeed, those who really desire the annexation of the Philippines, profess a great desire to make these islands a gateway through which we may secure the Chinese trade. If it is to be a gateway at all, the gate will swing both ways, and through it will come to us as our fellow-citizens of the republic untold numbers of men who are and must long remain wholly unfit for self-government.

Those who hold that fatalism in the form of "duty determines destiny," and that destiny itself is an affair of the heart rather than of the head, lightly reply to all this that they have proposed no such annexation as will make these islands subject to the Constitution and general laws of the United States. They assume, without shadow of authority, that Congress may deal with such acquisitions free from all constitutional restraints. This seems to be the view at Washington. It is even reported that the President will recommend to Congress the appointment of a commission to recommend a plan of insular taxation, both local and general. No commission is needed to point out the constitutional requirement that "all duties, imposts and excises shall be uniform throughout the United States."

The cool assumption that Congress may itself acquire and hold new territory conditioned that it shall not be subject to the Constitution and general laws of the United States, is the most dangerous development of the expansion craze through which we are passing. It means in plain language that there are those among us who, for the moment at least, are

prepared to discredit and even abandon representative government. Thus far it has been our greatest glory that ours is a government of laws, not a government of men. Presidents and Congresses have exercised only delegated powers. They have ruled as the servants and with the consent and co-operation of the people. It is now proposed that in addition to their duties as public servants, they shall take on other duties of an entirely different character; that they shall exercise a self-assumed, arbitrary and uncontrolled authority over distant and subject peoples. If this extraordinary program can be carried out, we shall see the President and Congress daily exercising from Washington both delegated and self-assumed powers. At one moment they will act as the duly authorized servants of a free people, and the next as despotic rulers of subject races. Their authority over us will remain at least in name expressly delegated. Their authority over their remote subjects will remain self-assumed and unrestrained.

It is a law of physics that two bodies cannot occupy the same space at the same time. Abraham Lincoln but declared the application of this law to the realm of politics when he declared that "this government cannot endure permanently half slave and half free." Under his great leadership his prediction that the Union would cease to be divided was gloriously fulfilled. The question for our generation is whether we shall voluntarily again divide it; whether we shall permit to be set up at the seat of government despotic power to compete with representative authority for final supremacy.

We may well inquire, as bearing on what shall be the line of demarcation between the constitutional authority of Congress and the arbitrary power which

it may asssume, by what warrant has the present Congress levied enormous taxes, borrowed immense sums of money and called some two hundred and fifty thousand men from productive occupations and subjected them to the physical danger and moral contamination of the camp? Such warrant must be sought in the self-assumed power of Congress, as it nowhere expressly appears in the Constitution. The purpose of that instrument was "to form a more perfect [not a less perfect] union, to establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." There is nothing here which contemplates the government of subject races or control of territory which is not within the Union. The Constitution confers upon Congress "power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense." It further provides for a militia "to execute the laws of the Union, suppress insurrections and repeal invasions." We shall look in vain in these provisions of our fundamental law for authority to wage aggressive war for the acquisition of territory. The truth is that this new variety of territorial expansion calls for an unconstitutional expansion of the powers of Congress.

We may, however, dismiss the fantastic assumption that Congress may acquire and govern territory which shall not be subject to the Constitution and general laws of the United States. The Supreme Court has said: "It cannot be admitted that the king of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring

territory, by treaty or otherwise, must hold it subject to the Constitution and laws of its own government."*

We may rest assured that all islands to which our civil authority shall be extended will become subject to our Constitution and general laws; that their inhabitants will become citizens of the United States and of the several States in which they may choose to reside; that as such citizens they will come and go at will throughout the entire country; that their government by Congress must be subject to the fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; that by our high tariffs we shall continue to grind their people into the dust as Spain has done before us; and that our dream of imperialism will saddle upon us awful burdens and finally lead us we know not whither. It is for this we are asked to return to militarism, with its grievous burdens and sordid ideals. It is for this we are to surrender our splendid and unique position. It is for such a mess of pottage we are to exchange our noble birthright. In our desire to save Cuba and the Philippines from excessive taxation we are to take it upon ourselves in perpetuity. In a vain effort to share our institutions with half-civilized men we are to destroy their character.

Those among us who have so suddenly awakened to what they are pleased to call our national "isolation," exhibit a growing impatience with the counsels of the fathers. They even lightly refer to them as puritanical and timid old souls, whose advice was well enough for a boy. They have just discovered that the nation has become a giant, who "is no longer content with the *nursery rhymes* which were sung around his

* Pollard *vs.* Hagan, 3 How. 312.

cradle."* They are especially certain that the Farewell Address is outgrown, and is no longer of value to a nation that has suddenly become a "World Power," and that even the Monroe Doctrine has become somewhat shopworn, or at least of but one-sided application. Yet the counsels of the fathers were not born of weakness or fear. The policy of non-interference by us in the affairs of Europe was early announced in the face of the pressing demands of France that we redeem the supposed obligations growing out of her assistance in our revolt against England. That of non-intervention by European powers on this continent was suddenly proclaimed in 1823 by a nation of less than twelve million souls in opposition to the "Holy Alliance," which had been organized by the emperors of Russia and Austria and the king of Prussia to conserve and maintain absolutism in Europe and over all lands claimed by European powers. The policies thus announced were believed by their authors to be of permanent application. It is, of course, possible that Washington was mistaken, but his counsels if wise are for all time. His solemn admonitions were not for temporary purposes. They ring in our ears to-day with the added weight of a century of successful application.

"Observe good faith and justice toward all nations. Cultivate peace and harmony with all. . . . 'Tis our true policy to steer clear of permanent alliances with any portion of the foreign world. . . . Harmony, liberal intercouse with all nations are recommended by policy, humanity and interest." Again: "The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations, to

*President Northrup, University of Minnesota, at Chicago Peace Jubilee banquet.

have with them as little political connection as possible."

These are not the words of transient wisdom or temporary expediency. Only what Washington and Hamilton expected has happened in America. We have merely reached the position which they clearly foresaw, "when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose peace or war as our interest, aided by our justice, shall counsel. Why forego the advantages of so peculiar a situation? Why quit our own to stand upon foreign ground? Shall we dash to the ground their splendid vision of a national life that shall lead the world to higher things by a spectacle of peace, liberty and prosperity? Shall we adopt a policy that will mark a complete departure from our well-considered course for a century, and convert a nation whose chief glory it has been to achieve a position to command permanent peace—the opportunity for the steady pursuit by an entire people of their chosen occupations—over a vast area, into a high priest of militarism? Taxation without representation is still tyranny. Government by force is still despotism.

This intolerance of the counsels of the father has led directly to ill-concealed contempt for our past and indifference to our present. Our great questions of administrative and monetary reform have suddenly become "parochial." The business of a mighty nation has as suddenly become "artificial and transient." Our people are called to abandon "the treadmill round

of domestic politics" for "new thoughts, new questions, new fields, fresh hopes, broader views, wider influences."* They are asked to surrender the work of self-government to behold the inauguration of despotic power at Washington. To encourage their support of this new departure at the pending Congressional elections, party managers are everywhere promising "the boys" additional spoils. These promises are to be kept by an early "revision" of the civil service rules, which shall break the solemn promises of a great party and its leader, thoroughly and honestly to enforce and extend wherever practicable the civil service law, and to take no step backward in the cause of a vital reform.

And even this is not all. The growing contempt for the counsels of the fathers extends to the Constitution itself. This was inevitable. Those counsels, including the Farewell Address, were in fact but popular expositions of the fundamental principles of the Constitution. It and they must stand or fall together. It is now said that "a Constitution and national policy adopted by thirteen half-consolidated, weak, rescued colonies, glad to be able to call their life their own, cannot be expected to hamper the greatest nation in the world."* It is even assumed that the ambiguous cheers of popular gatherings at railroad stations to greet the President while on a political pilgrimage, constitute a sufficient warrant for a vital change in the character of the government.

The suggestion that the Constitution be amended is impracticable. But if not, are we ready to surrender or even impair the bill of rights? Are we so soon prepared to limit the universal citizenship of the fourteenth amendment? Shall we give Congress power in

* Attorney-General Griggs.

its discretion to suspend the writ of *habeas corpus* in time of peace, to deprive citizens of personal liberty without conviction for crime by arbitrary confinement in certain places, to say in what parts of the United States imposts, duties and excises shall be uniform? In a word, shall Congress be given discretionary power to make the application of the Constitution and laws of the United States general or special? These questions are fundamental if free government is to continue. The supremacy of the Constitution must be preserved unless ours is to become a government of men instead of a government of laws.

It is in strict accord with a policy so revolutionary that no hint of it is to be found in the Republican platform of 1896. There it is merely declared that "all our interests in the *Western* Hemisphere" should be "carefully watched and guarded;" that "the Hawaiian Islands should be *controlled* by the United States, and no foreign power should be permitted to interfere with them;" that, as to the Cubans, "our best hopes go out for the full success of their determined contest for liberty;" and that "the government of the United States should actively use its *influence and good offices* to restore peace and give independence to the island." The use of power thus obtained to commit the country to a revolutionary policy is itself a gross betrayal of representative government.

It is solemnly urged in high places that we have no choice in this matter, that the unauthorized action of our public officials is in direct obedience to the Divine will. It is novel doctrine that public servants may substitute what they guess to be the will of God for the Constitution and laws of the land. There is none so exalted but that his whole public duty will be per-

*Franklin McVeagh in Chicago Times-Herald.

formed by a strict observance of his official oath to "preserve, protect and defend the Constitution of the United States," leaving it to those who make constitutions to determine how far they shall express finite conceptions of the infinite purpose.

These are but the first fruits of "imperialism" in the United States. They are quite sufficient to give promise of an abundant harvest. If the President and Congress are hereafter to reign over subject races in the exercise of despotic power, it is fitting that they should assume such power without pretense of delegated authority. But it cannot, must not be. Our people will not long permit the American flag to wave over "lesser breeds without the law." "Subjects" and "subject peoples" are impossible words in the lexicon of free government. All the territory of the United States must become self-governing States. All its people must be "citizens of the United States and of the states wherein they reside." All territory that may not become States, every people who may not become citizens, must be left without the Union. Peoples so incompetent for self-government as to require to be ruled by despotic power from without must be left to the oppression of others. Only by strict adherence to the American doctrine of an all inclusive citizenship of a Union of States can we work out our real destiny. All duties beyond this are not national but individual. It is for us as a nation to remain dedicated to our great task, "that government of the people, by the people, for the people, shall not perish from the earth."

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